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No. 83-661

In the Supreme Court of the United States

OCTOBER TERM, 1983

WILLIAM ROBERT SHOUN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether there was sufficient evidence of the existence of a conspiracy to permit the admission of out-of-court statements of co-conspirators.

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OPINION BELOW

The order of the court of appeals (Pet. App. 1-26) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on June 27, 1983. A petition for rehearing (Pet. App. 27-28) was denied on August 19, 1983. The petition for a writ of certiorari was filed on October 18, 1983. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Eastern District of Tennessee, petitioner was convicted of conspiracy to import cocaine and quaaludes, schedule II narcotics, in violation of 21 U.S.C. 846 and

960(1). Petitioner was sentenced to five years' imprisonment. The court of appeals affirmed (Pet. App. 1-26).

1. The evidence at trial, as reflected in the opinion of the court of appeals, showed that on May 24, 1982, petitioner's co-defendant Reba Joyce Reagan[1] asked Nathan Rothchild if he were interested in purchasing a large quantity of cocaine (Pet. App. 3). Rothchild, who was already a participant in the federal government's witness protection program, reported the offer to the FBI (*id.* at 4). The FBI provided Rothchild with recording devices and asked him to pursue the offer further and record any conversations that he could (*ibid.*).

Subsequently, Rothchild agreed to purchase from Reagan five kilograms of cocaine for $250,000 and one million quaaludes for $700,000 (Pet. App. 4). Reagan later told Rothchild that delivery of the drugs was being delayed because Reagan lacked an airplane suitable for transporting the drugs from South America (*ibid.*). Rothchild, acting on FBI instructions, offered to lease to Reagan a Cessna 404 capable of reaching Colombia and returning to the United States without refueling (*id.* at 4, 6).

On June 9, Rothchild spoke with petitioner's other co-defendant, Ray Ownby, about the plane (Pet. App. 4). Ownby claimed that he had made 25 or 30 prior trips to Colombia and that petitioner had been his copilot (*id.* at 5). Rothchild agreed to lease the plane for $10,000 plus $1,000 per hour for its use (*ibid.*).

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[1] Petitioner was tried jointly with Reagan and Ray Ownby. They were also convicted of conspiracy to import narcotics in violation of 21 U.S.C. 846, 960(1) and (3) (Pet. App. 1). Their convictions were affirmed in the same order affirming petitioner's conviction (Pet. App. 1-26), but they have not sought review of that judgment by this Court.

On July 16, Ownby and petitioner (Pet. App. 5-6; Tr. 109) visited Rothchild (Pet. App. 5). Rothchild asked petitioner if he intended to go with Ownby to South America and petitioner replied "yes" (*id.* at 6). In petitioner's presence, Ownby told Rothchild that petitioner had several thousand hours of flying experience and that petitioner would be doing most of the flying (Tr. 111).

The three men then proceeded to the Park National Bank, Bearden Branch, to look at Rothchild's "good faith" money (Pet. App. 6). Thereafter, they went to the Island Home Airport for the purpose of inspecting the plane that Rothchild had obtained; the plane had just been flown in by an FBI agent posing undercover as its operator. Rothchild asked the agent while petitioner was present if the agent were aware that the plane was to be used to transport drugs. The agent told him that he knew that, and asked if petitioner would be the pilot. Petitioner indicated that he "guess[ed] so" (*ibid.*).

2. The district court found by a preponderance of the evidence that the conspiracy existed, that the declarants and petitioner were members of the conspiracy and that the statements were made in furtherance of the conspiracy (Tr. 66, 135, 405-406). The record did not show whether the district court considered the co-conspirator statements themselves when making these determinations. The district court, however, instructed the jury to disregard all hearsay statements unless the jury found beyond a reasonable doubt that a conspiracy existed and that petitioner was a member of it (Pet. App. 23).

The court of appeals affirmed (Pet. App. 1-26). With regard to the admissibility of the co-conspirators' statements, the court noted that under its prior holding in *United States* v. *Vinson*, 606 F.2d 149 (1979), cert. denied, 444

U.S. 1074 (1980), the evidence is admissible if the conspiracy and the defendants' involvement in it are proved by a preponderance of the evidence, *including* the co-conspirator's statements. The court pointed out, however, that the district court's instruction to the jury exceeded the requirements of the rule in *Vinson* and therefore the co-conspirator statements were clearly admissible in this case (Pet. App. 23).

ARGUMENT

Petitioner challenges (Pet. 10) the district court's admission of unspecified statements made by his co-conspirators. He argues that the evidentiary predicate for the admission of such statements in the Sixth Circuit differs from the standard used by other courts of appeals, which exclude the co-conspirators' statements in deciding whether a conspiracy has been proved by a preponderance of the evidence. See, *e.g.*, *United States* v. *Nardi*, 633 F.2d 972, 974 (1st Cir. 1980).[2] This case, however, is not an appropriate vehicle for resolving whatever conflict may exist on this issue, because there was ample independent evidence in this case to establish the existence of a conspiracy and petitioner's participation in it, as well as relatively little evidence admissible solely as co-conspirator declarations. It is therefore clear that the statements at issue in this case would have been admissible under the test employed by any court.

It is well established that petitioner's own admissions, such as his statement that he was to be the pilot, may be considered as independent evidence of petitioner's role in the conspiracy. *E.g.*, *United States* v. *Roe*, 670 F.2d 956, 963 (11th Cir. (1982)), cert. denied, No. 81-7000 (Oct. 4, 1982). Other independent evidence of petitioner's involvement in the conspiracy included petitioner's statements

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[2]This Court recently denied a petition for a writ of certiorari on this precise issue in *Arnott* v. *United States*, No. 82-2028 (Oct. 31, 1983).

on July 16, 1982, in Rothchild's restaurant that he would be co-piloting the plane to South America, petitioner's visit to the bank with Rothchild and Ownby to view Rothchild's "good faith" money, and petitioner's presence with Rothchild and Ownby at the airport to inspect the plane (Pet. App. 4-5).

Other incriminating testimony included the statements made by others in petitioner's presence regarding his use of the plane to transport drugs, which would appear to constitute adoptive admissions under Fed. R. Evid. 801(d)(2)(B). See *United States* v. *Alvarez-Porraz*, 643 F.2d 54, 57-58 (2d Cir.), cert. denied, 454 U.S. 839 (1981). Accordingly, those statements also would properly be considered by any court in determining the existence of the conspiracy and petitioner's involvement in it (*ibid.*). See also *United States* v. *Batimana*, 623 F.2d 1366, 1369 (9th Cir.), cert. denied, 449 U.S. 1038 (1980); *United States* v. *Hoosier*, 542 F.2d 687, 688 (6th Cir. 1976). Indeed, petitioner does not specify what statements he believes were inadmissible or how those statements could possibly have prejudiced his defense in light of the substantial, properly admitted evidence of his involvement in the conspiracy.[3] Since it is plain that petitioner's conviction would not have been overturned under

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[3]We note that the jury was instructed that before considering the co-conspirator statements, it had to find beyond a reasonable doubt that a conspiracy involving petitioner existed and that the statements were in furtherance of the conspiracy (Tr. 426). This instruction was an unwarranted windfall for petitioner, since the admissibility issue should be decided by the court and not under a reasonable doubt standard. See *United States* v. *Enright*, 579 U.S. 980, 986-987 (6th Cir. 1978); *United States* v. *Nickerson*, 606 F.2d 156, 158 (6th Cir.), cert. denied, 444 U.S. 994 (1979); *United States* v. *Mastropieri*, 685 F.2d 776, 790 (2d Cir. (1982)), cert. denied, No. 82-454 (Oct. 18, 1982). The fact that the jury nevertheless convicted petitioner is an indication of how substantial the government's independent evidence of the conspiracy was in this case.

any standard regarding the admissibility of co-conspirator statements, it would be inapproprite to review the validity of the Sixth Circuit's *Vinson* rule in this case.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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